United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

205

No. 21,436

Walter J. Bowie

Appellant

vs.

United States of America

Appellee

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Donald L. Dennison

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(Appointed by this Court)

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STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court err in failure to instruct the jury upon request of counsel on the lesser-included offense of simple assault (D.C. Code 1961 Ed. sec. 22-504) when such instruction was supported by the evidence?

2. Should the conviction of the defendant for assault with a dangerous weapon under the indictment be reversed because of lack of corraboration of the testimony of the complaining witness where the case of the prosecution was based almost exclusively on such testimony?

3. Did the District Court err in refusing to grant the motion of defendant for judgment of acquittal (Tr. 26)?

4. Was the evidence presented against appellant sufficient to enable a jury to find him guilty beyond a reasonable doubt as to the count?

I N D E X

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,436

Walter J. Bowie,
Appellant
vs.
United States of America,
Appellee

JURISDICTIONAL STATEMENT

Walter J. Bowie, the appellant, was convicted in the United States District Court for the District of Columbia of violating D.C. Code (1961) Sec. 22-502, Assault With a Dangerous Weapon. He had also been charged with violation of D.C. Code (1961) Sec. 22-506, Mayhem, but this count was dismissed on motion by the United States. The District Court had jurisdiction to try the appellant for such offense, 18 U.S.C. 323.

Judgment of conviction was entered on October 13, 1967 and appellant's motion for leave to prosecute an appeal without prepayment of costs was granted on October 13, 1967.

This Court has jurisdiction upon appeal to review the judgment of the District Court under 28 U.S.C. 1291.

STATEMENT OF THE CASE

The complainant and the defendant were acquaintances of approximately a year and a half prior to the date of the alleged attack and the complainant rented an apartment on O Street, N.W. from the brother-in-law of the defendant (Tr. 13, 14).

On the evening of September 2, 1966, the defendant and the complainant went to a liquor store where a case of beer was purchased and subsequently the complainant returned to his downstairs basement apartment to clean up (Tr. 15). During the evening the complainant consumed some beer (Tr. 16) and at approximately 10:00 p.m., while making his bed, heard a knock at the door and upon answering it saw the defendant standing in the doorway. The complainant testified that the defendant "starting slinging" some material from a bottle and a drop of it hit the complainant in the eye (Tr. 18).

The complainant testified that prior to the alleged attack he had never had any trouble with the defendant and that the defendant had always "treated me all right". (Tr. 19).

Testimony from a medical expert indicates that the complainant appeared at the District of Columbia General Hospital at approximately 4:30 a.m. on September 3, 1966 and examination indicated that he had an unidentified substance in his left eye which tested as an alkali, although the material was not further identified (Tr. 7). There is no evidence as to the visual acuity of the complainant prior to the hospital visit, although the evidence shows that at the hospital his acuity in the left eye was 20/50 and he had dense cornial opacity covering approximately 65 percent of the left cornea and associated swelling and redness (Tr. 6, 7).

The alleged attack was reported to the Metropolitan Police Department nearly seven weeks after the alleged incident and stipulated testimony of a detective indicates that he visited the scene seven weeks subsequent to the alleged attack and observed some burns on the painted area surrounding the door entrance of the apartment (Tr. 25).

STATEMENT OF POINTS ON APPEAL

1. There was no instruction to the jury by the District Court on the lesser-included offense of simple assault, which error required the jury to either aquit or convict of the more severe charge of assault with a dangerous weapon.

2. There was not sufficient evidence from which the jury could have found the defendant guilty beyond a reasonable doubt, the only real evidence to prove the government's case being uncorroborated testimony of the complaining witness.

3. The District Court erred in refusing to grant the motion of defendant for judgment of acquittal at the close of the government's case in view of insufficiency of the evidence to allow the Court to submit the case to the jury.

4. There was insufficient evidence to enable the jury to find the defendant guilty beyond a reasonable doubt.

ARGUMENTS

I

In light of the evidence, the trial court should have instructed the jury on the lesser-included offense of simple-assault, and its failure to do so required the jury to choose between acquittal and conviction of assault with a dangerous weapon.

The evidence presented tended to show that the appellant came to the apartment of the complainant, an acquaintance of a year and a half (Tr. 13), carrying an unidentified liquid substance in a bottle and that appellant, for no apparent reason, "slung" some of the material about and at least one drop of it hit the complainant in one eye. (Tr. 18, 23, 24). The testimony shows no reason why appellant would have been motivated to purposely harm the complainant. Moreover, it indicates that the appellant and his wife were friendly with the complainant, and that in the evening of the alleged attack, the appellant and the complainant walked together to a nearby liquor store for some beer. (Tr. 15).

An unidentified liquid substance is not *per se*

a dangerous weapon. Cf. Jasey vs. U. S. 135 F. 2d 809 (D.C. Cir. 1943). In this regard it is unlike a knife or a gun, and it does not become a dangerous weapon until its dangerous properties are apparent and it is used in a menacing fashion. The gist of the crime of assault with a dangerous weapon is found in the character of the weapon with which the assault is made. Goswick vs. State 143 So. 2d 817, 820 (Fla. 1962).

While our statute, sec. 22-504, D.C. Code 1961 Ed., does not use the words "willfully" or "with intent", general intent still must be shown or inferred. Inference of intent must be stronger where the alleged weapon is a gun designed to kill or maim, than where the alleged weapon is an unidentified substance in a bottle.

The jury could have believed that appellant did not use the liquid in such a wanton manner as to inflict grievous bodily harm, but rather, handled such liquid with extreme carelessness. Hence, the general intent required for conviction of assault with a dangerous weapon was absent, although there could have been sufficient general intent for conviction of simple assault.

It is appellant's contention that the trial court erred in failing to instruct the jury on the lesser offense of simple assault. A defendant accused of assault with a dangerous weapon is entitled to instructions on simple assault as a lesser included offense if a foundation for it is found in the evidence. Greenfield vs. U. S. (1964) 341 F. 2d 411, 119 U. S. App. D. C. 278.

The Federal Rules of Criminal Procedure, Rule 31(c) provides:

> "CONVICTION OF LESS OFFENSE. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

This clearly would apply to the case now before this court as simple assault has long been recognized as a lesser offense necessarily included under a charge of assault with a dangerous weapon. Greenfield vs. U. S. (1964) 341 F. 2d 411, 119 U.S. App. D.C. 278; Crosby vs. U. S. (1964) 339 F. 2d 743, 119 U.S. App. D.C. 244; MacIlrath vs. U. S. (1951) 188 F. 2d 1009, 88 U.S. App. D.C. 270; Parker vs. U. S. (1966) 359 F. 2d 1009, 123 U.S. App. D.C. 343.

An instruction on simple assault is required even where the explanation which the jury is asked to accept is "implausible, unreliable and incredible" or the source "could well be regarded as of dubious reliability". Cf. Young vs. U. S. (D. C. Cir. 1962) 309 F. 2d 662; Hunt vs. U. S. (D.C. Cir. 1963) 316 F. 2d 652.

The trial court was clearly in error when it denied an instruction on simple assault.

II

The evidence concerning the alleged attack was based solely on the uncorroborated testimony of the complainant and, therefore, was insufficient for the jury to have found defendant guilty beyond a reasonable doubt.

There is not a scintilla of evidence other than the testimony of the complaining witness, Thomas P. Hawkins, by which the government can tie the defendant

to the alleged crime committed. Mr. Hawkins testified that he had walked with the defendant to a liquor store earlier in the evening of the alleged attack (Tr. 15). He further admitted that he had consumed "a couple of beers" (Tr. 16, 22).

The evidence discloses absolutely no motive for the defendant to have committed such an attack on Mr. Hawkins. On the other hand, the complainant had seen the defendant frequently and had even been to his house (Tr. 23). In Mr. Hawkins own words "I never had no trouble with him. He always treated me all right." (Tr. 19).

The stipulated testimony of the police officer, Det. Basil Pavlish (Tr. 25) was of no consequence at all since it related to burns on the paint near the entrance and on a plastic curtain which he observed on October 21, 1966, forty-nine days after the alleged attack. Testimony of such a nature indicating the condition of the premises seven weeks after the alleged act raises serious evidentiary considerations. The burns to the painted surfaces and the curtain could well have occurred during the hiatus.

Despite alleged severe injury and positive

identification by the complainant, he waited nearly a month and a half before he lodged any complaint with the police department. Such a delay would hardly be likely and would raise suspicion in the minds of most people concerning veracity of the witness.

The uncorroborated testimony of the complaining witness was not sufficient to sustain the conviction. There was no demonstrable evidence introduced at the trial. The bottle was not found, the liquid was not identified and there was no fingerprint evidence.

While Thompson vs. U. S. (1951) 188 F. 2d 652, 88 U.S. App. D.C. 235 holds that one can be convicted of robbery on the uncorroborated testimony of the complaining witness, that case can be distinguished. In Thompson there was only one witness for the government who could testify. Here there were others in the apartment building, according to the testimony of the complaining witness, who could have been called to at least substantiate the witness' claim that the defendant was on the premises on the night in question. The complainant testified that he saw the defendant in Clarence Jenkins' apartment (Tr. 14), yet Mr. Jenkins was never called to testify.

It is appellant's contention that the uncorroborated testimony of the complainant, who sat idle for nearly seven weeks subsequent to the alleged attack before reporting it to the police, should have been given little if any weight.

III

In view of the evidence produced by the government, the trial court should have granted the defendant's motion for judgment of acquittal at the close of the prosecution's case.

At the close of the government's presentation, counsel for the defendant moved the trial court for an acquittal (Tr. 26). This motion was denied.

Rule 29(a) of the Federal Rules of Criminal Procedure provides in part:

> "The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if

> the evidence is insufficient to sustain a conviction of such offense or offenses."

The government produced a medical specialist who examined the complainant, the complainant himself, and the stipulated testimony of a police officer who examined the scene of the alleged attack seven weeks after its occurrence. The medical expert testified that the complainant's visual acuity on examination was 20/50 in the left eye and 20/20 in the right eye (Tr. 6,7). There was no testimony as to the complainant's vision prior to the alleged attack. The expert further stated that he observed a water soluble material in the eye which tested as an alkali, but could identify it no further (Tr. 7). There was no evidence at all that lye was found in the eye of the complainant, yet the first count of the indictment and the charge upon which appellant was tried and convicted was that

> "On or about September 2, 1966, within the District of Columbia, Walter J. Bowie assaulted Thomas P. Hawkins with a dangerous weapon, that is a caustic solution known as <u>lye</u>." (Emphasis added)

The complainant himself never testified that the appellant threw lye or any other caustic substance <u>at</u> him, he merely stated: "He started slinging the stuff and something hit me in my eye, . . ." (Tr. 18).

When asked on cross examination to describe what the appellant did, he stated "Well he got to slinging it around" (Tr. 23).

> "Q. So you couldn't say that Mr. Bowie was trying to attack you, he was just tossing some around and some got on you? A. Well, I couldn't say. I was just standing in the door and he started flinging it."

The cumulative testimony presented was insufficient to sustain a conviction in accordance with F.R.Cr.P. 29(a), and the requested motion for acquittal should have been granted.

IV

The total of the evidence was insufficient for a jury to have found the appellant guilty beyond a reasonable doubt.

Under our form of jurisprudence, the jury is prohibited from convicting unless it can say that beyond a reasonable doubt the defendant is guilty as charged. Scurry vs. U.S. (1965) 347 F.2d 468, 120 U.S. App. D.C. 374.

Based upon the facts established by the evidence and those which can fairly be inferred therefrom, it is not believed that the jury properly applied the test of reasonable doubt in arriving at their verdict.

CONCLUSION

Wherefore it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

DONALD L. DENNISON

Counsel For Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Did the trial judge err in failing to instruct on simple assault, where testimony was of an assault with a dangerous weapon which defendant did not deny, and where objection thereto is raised for the first time on appeal?

2) Did the trial judge err in refusing to grant appellant's motion for judgment of acquittal, where the evidence was such that reasonable men would not necessarily have a reasonable doubt as to appellant's guilt?

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,436

WALTER J. BOWIE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 25, 1966, Walter J. Bowie was arrested for assault with a deadly weapon, lye, and indicted for assault with a dangerous weapon and mayhem on November 29, 1966.[1] Appellant was tried by a

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[1] The indictment read as follows:

FIRST COUNT:

On or about September 2, 1966, within the District of Columbia, Walter J. Bowie assaulted Thomas P. Hawkins with a dangerous weapon, that is a caustic solution known as lye.

[Footnote continued on page 2]

jury[2] on July 14, 1967 before Judge J. Jones, and the jury returned on the same day a verdict of guilty as charged on count one. He was sentenced to two to six years on October 13, 1967. This appeal followed.

The Government initially established the fact that complainant was examined in the emergency room of D.C. General Hospital at about 4:30 a.m. on September 3, 1966 and was retained in the hospital for seventeen days. Dr. Kling, having qualified as an expert witness, an opthalmologist, testified that his examination of Mr. Hawkins indicated injury to the left eye caused by a water soluble material which tested as a strong alkali, and that lye is a so-called strong alkali (Tr. 7). The doctor testified that the lower half of the left cornea was partially opacified, blocking the vision in that eye, and that prognosis for the vision of that eye was that it will not get better, it will get worse (Tr. 8).

On cross-examination by counsel for appellant, Dr. Kling further testified that the diagnosis was made on the physical findings on September 3rd that there was an alkali burn of the left cornea, the left conjunctiva and left eyelid not caused by an allergic reaction to an alkali (Tr. 10).

Complainant, Thomas P. Hawkins, then testified that he and appellant went to the store together to buy a case of beer, that complainant then returned to his room (Tr. 15), appellant having gone into an upstairs apartment. At about 10:30 p.m., complainant heard a knock on his door; when he asked "Who is it, just a moment," the person knocked again, and when he opened the door appel-

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[1] [Continued]

SECOND COUNT:

On or about September 2, 1966, within the District of Columbia, Walter J. Bowie wilfully and maliciously maimed and disfigured Thomas P. Hawkins by throwing on him a caustic solution known as lye, inflicting injuries to the left eye of the said Thomas P. Hawkins.

[2] The second count of the indictment was dismissed on July 14, 1967 on oral motion of the Government.

lant was standing in the doorway (Tr. 18), and without saying anything appellant started flipping something out of a narrow mouthed bottle, a little larger than a coke bottle (Tr. 23), that some of the liquid got in his eye, a little on his back and some got on the plastic curtain by the doorway (Tr. 18).

Complainant testified that the solution hit him only in his left eye, that prior to the attack he had no trouble with his left eye and that his right eye is perfect (Tr. 18, 19). On cross-examination, Mr. Hawkins clearly stated that appellant threw the liquid at him (Tr. 22).

The stipulated testimony of Detective Pavlish was that he went to complainant's room on October 21, 1966 and observed burns on the paint surrounding the entrance to the room and burns on the plastic curtains by the doorway (Tr. 25). The transcript does not indicate the date that a report of the incident was made to the Metropolitan Police Department. Appellant's counsel below did not elicit testimony from the witness as to the date of his report.

When the Government rested its case, the defense moved for a judgment of acquittal which the court denied. The defense then rested (Tr. 26).

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall

instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

SUMMARY OF ARGUMENT

I

Reversible error was not committed by the trial judge in failing to instruct on simple assault. The evidence did not justify such an instruction, and defense counsel in effect so stated and argued. Moreover, the record does not reflect a request for such an instruction and the present assignment of error comes too late.

II

The motion for judgment of acquittal at the end of the Government's case was properly denied. One can be convicted of assault with a dangerous weapon on the uncorroborated testimony of the complaining witness. Under well-settled law in this jurisdiction, in ruling on a motion for judgment of acquittal, the trial judge must assume the truth of the prosecution's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom.

Appellant should not be allowed to challenge for the first time on appeal the sufficiency of the evidence underlying the jury's verdict of guilt. In any event, the evidence was clearly sufficient to support the submission of the case to the jury and to sustain the jury's verdict on appeal.

ARGUMENT

I. The trial judge did not commit reversible error in failing to instruct on simple assault.

(Tr. 7, 10, 28-29)

Appellant contends that the trial judge committed reversible error in failing to charge that the jury might find appellant guilty of simple assault as a lesser offense necessarily included in the offense of assault with a dangerous weapon.

A lesser included offense instruction "should not be given unless there is evidence to justify it," *Burcham* v. *United States*, 82 U.S. App. D.C. 283, 284, 163 F.2d 761, 762 (1947). Here, the testimony was of an assault with a dangerous weapon which appellant Bowie did not deny. The record is devoid of any support for the proposition that a foundation for simple assault (Br. 7) is found in the evidence.[3]

A description of the weapon charged here is "a caustic solution known as lye." The medical testimony described the injury as an alkali burn to the left eye (Tr. 10) caused by a "strong alkali" and that lye is a so-called strong alkali (Tr. 7), and further that there are no other known alkalies which could cause an allergic reaction (Tr. 10) approaching damage similar to the injury suffered by Mr. Hawkins. That lye constitutes a dangerous weapon was settled in *Tatum* v. *United States*, 71 U.S. App. D.C. 393, 110 F.2d 555, 556 (1940).

This Court has held that failure to instruct on simple assault is reversible error, *but only* when there was an issue as to the dangerousness of the weapon used and when a request for the instruction was made. *Parker* v. *United States*, 123 U.S. App. D.C. 343, 359 F.2d 1009 (1966); *Greenfield* v. *United States*, 119 U.S. App. D.C. 278, 341 F.2d 411 (1964). It is clear that the throwing

[3] In fact, appellant's counsel in closing argument (Tr. 28) stressed to the jury that no assault took place, that the liquid was not directed toward complainant, and objected to the prosecution's use of the word "assault" (Tr. 29).

of the lye in the instant case, if not accidental (Tr. 28), was nothing less than an assault with a dangerous weapon. *MacIllrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951); *Goodall* v. *United States*, 86 U.S. App. D.C. 148, 180 F.2d 397, 400, *cert. denied*, 339 U.S. 987 (1950).

Moreover, the record does not show a request for such an instruction below, and the present assignment of error comes too late. Fed. R. Crim. P. 30; *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1960); *cf. Mundy* v. *United States*, 85 U.S. App. D.C. 120, 176 F.2d 32 (1949).

II. The trial judge properly denied appellant's motion for judgment of acquittal.

In reviewing the sufficiency of the evidence, this Court and the trial judge "must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom." *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947). See *Glasser* v. *United States*, 315 U.S. 60 (1942); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967). Unless it can be said that there was "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt," *Curley*, *supra* at 392-93, 160 F.2d at 232-33, denial of a motion for judgment of acquittal is proper.

On the evidence presented in the instant case, cumulatively viewed, there is no question that the case was properly submitted to the jury or that there was sufficient evidence to support the jury's verdict of guilt.

The jury must take the Government's case as a whole and determine whether as a whole it proves guilt beyond a reasonable doubt. *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652, 654 (1963). Questions of credibility of witnesses and the comparative weight to be given their testimony are properly within the province of the jury. *Thompson* v. *United States*, 88

U.S. App. D.C. 235, 188 F.2d 652 (1951). Moreover, in *Curley* v. *United States, supra,* this Court noted that "if the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision is for the jury to make. In such a case, an appellate court cannot disturb the judgment of the jury." We submit that appellant's standard is improper in reference to reviewing on appeal the evidentiary basis of a jury's verdict of guilty (Br. 13, 14). No post verdict motion for judgment of acquittal was made. Had the issue been raised below, the trial judge would have been able to rule on it and properly frame any such issue for appellate review. *Pea* v. *United States,* 116 U.S. App. D.C. 410, 324 F.2d 442 (1963), *vacated on other grounds,* 378 U.S. 571 (1964).

Appellant's assertions as to the time complainant lodged a complaint with the police department (Br. 9, 10, 11) is not supported by the record. Appellant's attempt to distinguish *Thompson* v. *United States, supra,* from the instant case (Br. 9, 10), by raising a missing witness type claim is without merit.

We submit that the record demonstrates that the trial judge properly denied appellant's motion for judgment of acquittal and correctly instructed the jury.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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FRANK Q. NEBEKER,
JOAN A. BURT,
Assistant United States Attorneys.

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